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Mostafa Lesanibaroogh Ebrahim & Anor v Public Prosecutor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(M)-92–02 OF 2016(IRN) AND B-05(M)-94–02 OF 2016(IRN)
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
27 APRIL 2017

C

Criminal Procedure — Search — Seizure — Appellants suspected of carrying dangerous drugs within their bodies admitted to hospital for 2 1/2 days under police supervision — During course of stay appellants expelled capsules containing large amounts of methamphetamine through normal bowel movement — Whether normal bowel movement did not fall within meaning of 'intrusive search' — Whether 'intrusive search' under para 13(1) of Fourth Schedule to the Criminal Procedure Code involved not only act of examination to determine existence of object, evidence, weapon or contraband within body but also their removal by means of medical appliances or force

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Evidence — Corroboration — Courts' approach to corroboration — Police sentries guarding appellants admitted to hospital ward for 2 1/2 days received from appellants capsules excreted by them containing large amounts of methamphetamine — Capsules excreted in course of normal bowel movement — Whether evidence of sentries that appellants handed them capsules without qualified medical officer being present required corroboration — Evidence Act 1950 s 134 — Whether trial court could accept arresting officer's oral evidence that appellants attempted to run away to escape arrest when that fact was not stated in his police report — Whether omission to state that fact in police report neither fatal to prosecution's case nor prejudiced appellants materially

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High Court sentenced the appellants to death after finding them guilty of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. The first appellant was charged with trafficking in 562.3g of methamphetamine while the second appellant was charged with trafficking in 269.1g of the same drug. The drugs were found in several capsules excreted by both the appellants during the 63 hours they were detained in the ward of a government hospital where they were taken after police apprehended them at the Kuala Lumpur International Airport ('KLIA') upon their arrival from Dubai. After a body search and a search of their baggage did not reveal anything incriminating, police took the appellants to the hospital where x-rays showed the presence of foreign objects in their intestines. During their hospital stay, the appellants were guarded by police detectives who received the capsules from the appellants

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after they were excreted and washed. The trial court called for the defence after finding the prosecution had made out a prima facie case. The appellants denied any knowledge about the drugs and claimed they accepted an offer of work from a person named Mehdi in Iran who asked them to transport dental medicine in the capsules to Malaysia and required them to swallow the capsules to avoid paying tax. The trial court rejected the defence and held that the appellants were not innocent carriers as they claimed. In the instant appeal against the High Court's decision, the first appellant contended that the evidence of the police sentries at the hospital regarding the recovery of the capsules was inadmissible because s 20A and paras 13, 14 and 15 of the Fourth Schedule of the Criminal Procedure Code ('the CPC') were not complied with. The first appellant said an intrusive search was done on his body without his consent; the capsules were recovered in the presence of the police sentries without a qualified medical officer being present; and the mere evidence of the sentries uncorroborated by the production of any medical records, x-ray records and the station diary was unacceptable. The first appellant also argued that the police's failure to investigate 'Mehdi' prejudiced the appellants' case. The second appellant, meanwhile, contended that the trial court erred in rejecting his defence after failing to appreciate it fully. He also said the trial judge should not have relied on the evidence of the arresting officer ('PW1') in court that the appellants had attempted to run away to evade arrest at the KLIA because PW1 never said so in his police report.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) Pursuant to para 13(1) of the Fourth Schedule to the CPC, intrusive search not only involved the act of examination to determine the existence of any object, evidence, weapon or contraband, but also included the removal of such object, evidence, weapon or contraband. It was clear that the word 'removal' strongly indicated an affirmative or positive action either by means of medical appliances or by means of forceful work by somebody upon the appellants. In this case, no such things were done upon the appellants before they excreted the capsules. The evidence of the sentries showed that all the capsules were excreted through the bowel movement of the appellants without intrusive body search. Normal bowel movement did not fall within the meaning of intrusive search (see para 32).

(2) As to argument that the evidence of the sentries was not corroborated in material particulars due to the non-production of any medical records, x-ray records and the station diary, the answer was easily found in s 134 of the Evidence Act 1950 which stated that 'No particular number of witnesses shall in any case be required for proof of any fact' (see para 33).

(3) No effective 'Alcontara Notice' was given by the appellants with regard to 'Mehdi'. Therefore, the police could not be blamed for the failure to investigate 'Mehdi' (see para 41).

(4) The trial judge had considered all the issues raised by the appellants in their defence, especially their main defence that they were innocent carriers, and had rejected the defence. The trial judge's finding was not perverse to warrant appellate intervention. The evidence against both the appellants was overwhelming. This court agreed with the trial judge that the appellants' contention that they swallowed the capsules to avoid paying tax was unbelievably incredible. Bringing in dental medicine into Malaysia was not prohibited and it was also not dutiable goods (see paras 43–44).

(5) There was no error on the part of the trial judge in accepting the explanation proffered by PW1 as to why his police report did not state the material fact that the appellants had attempted to run away. The failure to state that fact did not in any way prejudice the appellants materially. The police report being the first information report ('FIR') should not include every minute detail of the incident regarding the arrest and seizure of the exhibits. It was sufficient to contain some information to trigger an investigation. PW1's failure to state in his FIR the material fact that the appellants had attempted to run away was in no way fatal to the prosecution's case (see paras 50 & 52).

(6) The convictions of the appellants were safe. On the totality of the evidence, the surrounding circumstances and the probabilities of the case, the trafficking charges as amended were proven against the appellants beyond a reasonable doubt (see paras 53–54).

[Bahasa Malaysia summary

Mahkamah Tinggi menjatuhkan hukuman mati ke atas perayu-perayu setelah mendapati mereka bersalah mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu pertama dituduh dengan mengedar sebanyak 562.3g metahamphetamine manakala perayu kedua dituduh dengan mengedar sebanyak 269.1g dadah yang sama. Dadah itu dijumpai dalam beberapa kapsul yang dikeluarkan oleh kedua-dua perayu sewaktu 63 jam mereka ditahan di wad hospital kerajaan di mana mereka dibawa setelah polis menangkap mereka di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') semasa ketibaan mereka dari Dubai. Selepas carian badan dan carian terhadap bagasi mereka ia tidak menunjukkan apa-apa yang bersalah, polis membawa perayu ke hospital yang mana x-tray menunjukkan kehadiran objek asing dalam usus mereka. Sewaktu mereka tinggal di hospital, perayu telah dijaga oleh polis detektif yang menerima kapsul daripada perayu setelah ia dikeluarkan dan dibasuh. Mahkamah perbicaraan memanggil untuk pembelaan setelah mendapati pihak pendakwaan telah membuat satu kes prima facie. Perayu-perayu menafikan

apa-apa pengetahuan tentang dadah dan mendakwa mereka menerima satu tawaran kerja daripada seorang yang bernama Mehdi di Iran yang meminta mereka untuk membawa ubatan pergigian dalam kapsul ke Malaysia dan mengkehendaki mereka untuk menelan kapsul untuk mengelak dari membayar cukai. Mahkamah perbicaraan menolak pembelaan dan memutuskan bahawa perayu-perayu bukanlah pembawa tidak bersalah seperti yang didakwa oleh mereka. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu pertama menghujahkan bahawa keterangan sentri polis di hospital berkaitan penemuan kapsul adalah tidak boleh diterima kerana s 20A dan perenggan 13, 14 dan 15 Jadual Keempat Kanun Tatacara Jenayah ('KTJ') tidak dipatuhi. Perayu pertama mengatakan satu carian intrusif telah dilakukan ke atas badannya; kapsul diambil dalam kehadiran sentri polis tanpa kehadiran seorang pegawai perubatan yang layak; dan keterangan sentri semata-mata tidak disokong oleh apa-apa laporan perubatan, laporan x-tray dan diari stesen adalah tidak boleh diterima. Perayu pertama juga menghujahkan bahawa kegagalan polis untuk menyiasat 'Mehdi' memprejudiskan kes perayu. Perayu kedua, sementara itu, menghujahkan bahawa hakim tidak sepatutnya bergantung terhadap keterangan pegawai penangkapan ('PW1') dalam mahkamah bahawa perayu telah mencuba untuk mengelak daripada ditangkap di KLIA kerana PW1 tidak pernah mengatakan sebegitu dalam laporan polisnya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Menurut perenggan 13(1) Jadual Keempat KTJ, carian intrusif bukan sahaja melibatkan tindakan pemeriksaan untuk menentukan kewujudan apa-apa objek, keterangan, senjata atau barang seludupan, tetapi juga termasuk pengalihan objek, keterangan, senjata atau barang seludupan sebegitu. Ia adalah jelas bahawa perkataan 'removal' dengan nyata menunjukkan satu tindakan afirmatif atau positif sama ada dengan peralatan perubatan atau dengan cara kerja paksaan seseorang terhadap perayu. Dalam kes ini, tiada perkara tersebut telah dilakukan terhadap perayu sebelum mereka mengeluarkan kapsul. Keterangan sentri menunjukkan bahawa kesemua kapsul dikeluarkan melalui pergerakan usus perayu tanpa carian badan intrusif. Pergerakan normal usus tidak terangkum dalam carian intrusif (lihat perenggan 32).

(2) Berkaitan dengan hujahan bahawa keterangan sentri tidak disokong dalam butiran material disebabkan oleh tiada apa-apa laporan perubatan, laporan x-ray dan diari stesen, jawapannya dengan mudah didapati dalam s 134 Akta Keterangan 1950 yang menyatakan bahawa 'No particular number of witnesses shall in any case be required for proof of any fact' (lihat perenggan 33).

(3) Tiada 'Alcontara Notice' efektif telah diberikan oleh perayu berkaitan dengan 'Mehdi'. Oleh itu, polis tidak boleh dipersalahkan untuk

kegagalan untuk menyiasat 'Mehdi' (lihat perenggan 41).

(4) Hakim perbicaraan telah mempertimbangkan semua isu yang dibangkitkan oleh perayu-perayu dalam pembelaannya terutama pembelaan utama mereka bahawa mereka adalah pembawa tidak bersalah, dan telah menolak pembelaan. Dapatan hakim perbicaraan adalah tidak bertentangan untuk menyebabkan campur tangan mahkamah rayuan. Keterangan terhadap kedua-dua perayu adalah sangat kukuh. Mahkamah ini bersetuju dengan hakim perbicaraan bahawa hujahan perayu bahawa mereka menelan kapsul untuk mengelak dari membayar cukai adalah amat tidak boleh dipercayai. Membawa masuk ubat pergigian ke Malaysia adalah tidak dilarang dan bukan barangan yang dikenakan duti (lihat perenggan 43–44).

(5) Tiada kekhilafan di pihak hakim perbicaraan dalam menerima penjelasan yang diberikan oleh PW1 akan mengapa laporan polisnya tidak menyatakan fakta material bahawa perayu telah mencuba untuk melarikan diri. Kegagalan untuk menyatakan fakta tidak dalam apa keadaan pun memprejudiskan perayu secara material. Laporan polis yang menjadi laporan maklumat pertama ('LMP') tidak sepatutnya mengandungi semua minit butiran kejadian berkaitan penangkapan dan rampasan ekhsibit. Adalah mencukupi untuk mengandungi beberapa maklumat untuk mencetus satu penyiasatan. Kegagalan PW1 untuk menyatakan fakta material dalam LMPnya bahawa perayu telah mencuba untuk melarikan diri adalah tidak fatal dalam kes pendakwaan (lihat perenggan 50 & 52).

(6) Sabitan perayu adalah selamat. Atas keseluruhan keterangan, persekitaran keadaan dan kemungkinan kes, pertuduhan pengedaran seperti yang dipinda telah dibuktikan terhadap perayu melampaui keraguan munasabah (lihat perenggan 53–54).]

Notes

For a case on courts' approach to corroboration, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1288.

For cases on seizure, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4017–4018.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Bakri Mohamad Ali v PP [2010] 1 CLJ 610 (refd)

Chonmanee Laphathanawat v PP [2017] 4 MLJ 227; [2017] 1 LNS 72, CA (refd)

Lee Ah Seng and Anor v Pendakwa Raya [2007] MLJU 346; [2007] 5 CLJ 1, FC (folld)

Marimuthu a/l Seringan lwn Pendakwa Raya [2016] MLJU 1561; [2016] 1 LNS 64, CA (refd)
PP v Bayati Heidar [2016] 6 MLJ 1; [2017] 1 CLJ 669, CA (refd)
PP v Herlina Purnama Sari [2016] MLJU 1824; [2017] 1 MLRA 499, FC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151, FC (refd)
Tan Lay Hwa v PP [2016] MLJU 1676; [2016] 1 LNS 507, CA (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)

Legislation referred to

Criminal Procedure Code s 20A, Fourth Schedule, paras 2, 13, 13(1), 14, 15
Dangerous Drugs Act 1952 s 2, First Schedule
Evidence Act 1950 s 134

Appeal from: Criminal Trial Nos 45A-8 and 9–01 of 2012 (High Court, Shah Alam)

Suzanawati bt Ismail (Suzana Ismail & Partners) for the first appellent.
James George (James George & Co) for the second appellant.
Tengku Intan Suraya bt Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

[1] The appellants were charged separately in the High Court at Shah Alam with an offence of trafficking in dangerous drugs. Due to the peculiar facts and circumstances of their case, they were tried together at the request of the prosecution without any objection taken on behalf of the defence.

[2] The charges against both the appellants read as follows:

The amended charge against the first appellant:

> Bahawa kamu pada 8.6.2011 jam 6.50 petang sehingga 11.6.2011 jam lebih kurang 10.00 pagi di Wad 6C, Hospital Serdang, di dalam daerah Sepang, dalam negeri Selangor, telah mengedar dadah berbahaya iaitu methamphetamine seberat 562.3 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The amended charge against the second appellant:

> Bahawa kamu pada 8.6.2011 jam 6.50 petang sehingga 11.6.2011 jam lebih kurang 10.00 pagi di Wad 6C, Hospital Serdang, di dalam daerah Sepang, dalam negeri Selangor, telah mengedar dadah berbahaya iaitu methamphetamine seberat 269.1 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah

A seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] At the end of the prosecution's case, the learned High Court judge ('learned trial judge') was satisfied that the prosecution had established a prima facie case against both the appellants. Accordingly, both the appellants were called upon to enter their defence.

[4] At the end of the trial, upon hearing the defence, the learned trial judge found both the appellants guilty as charged. The appellants were convicted and sentenced to suffer the mandatory death sentence.

[5] Aggrieved, both the appellants appealed to this court against both the convictions and sentences imposed by the learned trial judge.

[6] We heard both the appeals on 24 March 2017. After hearing all the parties, we dismissed the appeals and affirmed the convictions and sentences of the High Court. We now give our grounds of doing so.

THE PROSECUTION'S CASE

[7] The prosecution's case may be summarised as follows. On 7 June 2011 at about 3.45pm, both the appellants were detained by Sub-Insp Mohd Dalila bin Mansor ('PW1') and his team at the Kuala Lumpur International Airport ('KLIA') upon their arrival on a flight from Dubai. According to PW1, they looked nervous. A body search on them and their baggage inspection revealed nothing incriminating. PW1 then informed his superior and he was instructed to take both the appellants to the Serdang Hospital for further examination.

[8] PW1 then brought both the appellants to the Serdang Hospital and reached the hospital at around 4pm and handed them over to Dr Joel Sateeish Kumar a/l Kuppusamy ('PW10') who conducted an x-ray on both the appellants' abdomen. Pursuant to the x-ray, PW10 and Dr Navin Freddy ('PW3') confirmed the presence of foreign objects in their intestines. Both the appellants were then detained at ward 6C of the hospital from 6.50pm on 8 June 2011 until 10am on the 11 June 2011.

[9] During the period of their detention, they were guarded by a chief sentry who was on duty with few other sentries on a rotation basis. The sentries were Detective Corporal Hamad Rahman bin Zainal ('PW4'), Detective Corporal Mohd Sazman bin Abdullah @ Mat Ali ('PW5'), Detective Corporal Ramasenteram a/l Manar ('PW6'), Detective Corporal Zahid bin Zakaria

('PW7') and Detective Corporal Abd Ghani bin Budin ('PW8'). The chief sentry's duty was to inform PW1 of the excretion of any foreign matter by the appellants.

[10] Within the period of the appellant's detention at the ward 6C, the first appellant had excreted 86 capsules and the second appellant had excreted 60 capsules. The capsules were kept in plastic bags with each capsule bearing the marking made by the respective sentries who received them from the appellants after they had been washed. All the plastic bags together with the capsules in them were later handed over by the respective sentries to the investigating officer, Inspector Haryati bt Zaharuddin ('PW11').

[11] On 23 June 2011, at around 3.21pm, PW11 handed over all the capsules to the chemist, Zulkfeli bin Mohd Edin ('PW2') for analysis. PW2 confirmed upon analysis that the 86 capsules excreted by the first appellant contained 562.3 nett grams of methamphetamines, whereas the 60 capsules recovered from the second appellant contained 269.1 nett grams of methamphetamines. The methamphetamines are listed in the First Schedule of the Dangerous Drugs Act 1952 ('the Act').

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[12] The learned trial judge had considered the evidence of the chemist ('PW2') and accepted his evidence as to the type and weight of the drugs, the subject matter of the charges against the appellants respectively.

[13] As for the element of possession, the learned trial judge held that the appellants were in custody and control of the impugned drugs and had the requisite knowledge of the drugs based on the fact that the capsules containing the impugned drugs were found in their abdomen. The learned trial judge found that the appellants were in physical possession of the drugs without the need to resort to the statutory presumption under the Act.

[14] As for the element of knowledge, the learned trial judge relied on the decision of this court in *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 where, having found that the method employed was clearly to avoid detection, held that such intention to conceal pointed to knowledge.

[15] On the element of trafficking, the learned trial judge relied on the evidence of both the appellants' overt act of carrying and concealing the impugned drugs in their abdomen and transporting them from Iran into

A Malaysia, and considering the large amount of drugs involved which could not have been for their own personal consumption, the learned trial judge found that the appellants' were trafficking in the impugned drugs as defined under s 2 of the Act.

B **[16]** After being satisfied that all the elements of the amended charges had been proven, the learned trial judge held that the prosecution had established a prima facie case against the appellants. The appellants were than called upon to enter their defence.

C THE DEFENCE

[17] Both the appellants elected to give evidence under oath. In their defence, the appellants denied any knowledge about the drugs in the capsules they swallowed eventhough they admitted that they do it willingly without any D compulsion or coercion from anybody.

[18] Other aspect of their testimony were that they were good friends from childhood. The first appellant testified that he worked as a taxi driver. The E second appellant worked as a government servant earning about USD1,000 per month. The first appellant said he came to know a person by the name of Mehdi. Later, he introduced Mehdi to the second appellant. They later became good friends with Mehdi.

F **[19]** One day while they were in the first appellant's taxi, Mehdi offered work for them ie to sent dental medicine from Erbil, Iran to Malaysia. Mehdi told them that in order to avoid paying tax, they have to swallow the medicine in the form of capsules into Malaysia. They agreed and accept the offer.

G **[20]** Mehdi took them to a hotel in Erbil and in the hotel room they swallowed the capsules given to them by Mehdi. Mehdi told them that all the capsules contained dental medicine. They believed him as Mehdi had opened up a few capsules and swallowed the contents in front of them.

H **[21]** They then took a flight to Dubai and then to KLIA. While they were at outside the KLIA terminal waiting for a taxi, they were detained by the police. They were later taken to a hospital where they excreted all the capsules swallowed by them.

I **[22]** The learned trial judge after considering both the appellants' version, found that the appellants had not succeeded in creating a reasonable doubt on the prosecution's case. The learned trial judge held that both the appellant's defence was nothing more than mere denial, a recent invention and an

afterthought. The learned trial judge also rejected both the appellants' defence of an innocent carrier or momentary carrier without knowledge.

[23] The learned trial judge dealt with the appellants' defence as follows, as at pp 39–43 of the AR Vol 1:

> 54. Samada pembelaan yang diberikan oleh kedua-dua OKT di atas telah berjaya menimbulkan satu keraguan yang munasabah di dalam ertikata prinsip-prinsip kes yang dirujuk di atas? Undang-undang tidak meletakkan apa-apa beban ke atas mereka untuk membuktikan bahawa mereka tidak bersalah, jika pun terdapat beban, bebannya adalah ringan dan hanya pada tahap imbangan kebarangkalian sahaja. Ini saya merujuk kepada kes-kes *Saminathan vs PP* [1955] 21 MLJ 121, *Yau Heng Fang vs PP* [1985] 2 MLJ 335 dan *Wong Chooi vs PP* [1967] 2 MLJ 180.
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> 55. Setelah meneliti pembelaan OKT-OKT ini dan setelah saya mengkaji kembali kes pendakwaan, saya dapat membuat kesimpulan-kesimpulan berikut:
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> (a) Pembelaan tidak mempertikaikan bahawa kedua-dua OKT telah menelan kapsul-kapsul tersebut untuk tujuan dibawa ke Malaysia dan pada masa ditangkap, kapsul-kapsul tersebut masih berada di dalam perut kedua-dua OKT. Bagaimanapun pertikaian yang timbul ialah samada kedua-dua OKT menelan kapsul-kapsul yang mengandungi dadah itu dengan kerelaannya, dan kedua-dua OKT tahu ia adalah mengandungi dadah berbahaya.
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> (b) Samada kedua-dua OKT cuba untuk melarikan diri daripada pasukan serbuan? Keterangan SP1 tidak disokong oleh laporan polisnya, bagaimanapun keterangan lisan SP1 boleh diterima atas alasan bahawa SP1 bukanlah saksi yang berkepentingan. Rujuk kepada kes *PP vs Abd Latif bin Sakimin* [2005] 6 MLJ 351 dan kes *State of Kerala vs MM Mathews* [1978] SCC 65.
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> (c) Samada pembelaan kedua-dua OKT bersifat 'after thought'? Diperingkat kes pembelaan, kedua-dua OKT mengatakan bahawa Mehdi telah memberitahu mereka bahawa kapsul-kapsul tersebut berisi bahan untuk perubatan gigi, perkara ini tidak pernah dibangkitkan ketika kes pendakwaan, maka saya bersetuju dengan hujah TPR terpelajar bahawa pembelaan OKT-OKT ini hanyalan suatu 'after thought' dan rekaan mereka berdua untuk melepaskan diri. Dengan merujuk kepada kes *Tan Kim Ho & Anor vs PP* (di atas) yang antara lainnya menyebutkan berikut:
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> In order to determine whether an accused was telling the truth, one of the consideration is whether he had indicated his defence during the prosecution's case.
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> (d) Ketika kes pendakwaan cadangan yang dibuat peguambela terpelajar ialah kedua-dua OKT tidak tahu isu kandungan kapsul-kapsul itu memandangkan keadaan kapsul-kapsul tersebut yang bertutup rapat, tiada cadangan yang mengatakan Mehdi telah membuka kapsul-kapsul itu untuk membuktikan bahawa ia berisi bahan untuk pergigian. Jelas di sini satu pembelaan bersifat 'after thought'.

(e) Merujuk kepada keputusan kes *Lonut Alexandru Gologan vs PP* (di atas) ia ada menyebutkan berkenaan dengan pembelaan yang 'inconsistent' iaitu berikut:

> [27] We find that the appellant's explanation regarding the bag is inconsistent. Both PW2 and PW3 heard him say that the clothes in the bag belonged to his mother. This prompted PW3 to ask him where his mother was, and he said that she was in Romania. This evidence was not challenged by the defence. There is also no evidence that the appellant had informed the IO about Matha. Yet in his defence the appellant said that the clothes belonged to Matha who was supposed to collect the bag from him in Malaysia. The issue of 'Matha' was never put to both PW2 and PW3. Further, if Matha was in Malaysia, why did the appellant mention 'Romania' in his reply to PW3? We find no reason to disbelieve PW3 on this issue. We agree with the trial judge that the appellant's story that Daniel had given him the bag is a bare assertion and that 'Matha' is an afterthought.

(f) Watak Mehdi pula, pada pendapat saya hanyalah satu rekaan oleh kedua-dua OKT untuk melepaskan diri mereka, walaupun ada kemungkinan terdapat nama Mehdi di dalam handphone mereka, akan tetapi kedua-dua OKT telah gagal untuk memberikan butiran-butiran lanjut berkenaan dengan nama tersebut. Kemungkinan Mehdi tidak wujud tidak boleh diketepikan.

(g) Memandangkan bahawa watak 'Mehdi' ini hanya rekaan OKT-OKT maka pembelaan 'innocent carrier' atau 'momentary carrier with no knowledge of drug contents' adalah gagal sama sekali. Rujuk kepada kes *Teh Hock Leong vs PP* [2010] 1 MLJ 741.

(h) Pembelaan kedua-dua OKT juga adalah bahawa mereka menelan kapsul-kapsul tersebut bertujuan untuk mengelak cukai yang tinggi ke atas bahan tersebut juga adalah tidak munasabah dan 'after thought defence', keputusan ini telah dirakamkan oleh Mahkamah Rayuan di dalam kes *Modjtaba Hosseinzadeh Majid & Hamid Hossainzadeh Abdolhossein v PP* [2015] 1 LNS 434 yang telah menolak pembelaan tersebut atas alasan pembelaan tersebut bersifat 'after thought'. Mahkamah Rayuan telah merujuk kepada kes *Tunde Apatira vs Public Prosecutor* [2000] 1 CLJ 381.

(i) Berdasarkan kepada alasan-alasan di atas saya berpuashati bahawa pembelaan OKT-OKT ini tidak boleh dipercayai dan telah gagal untuk mematahkan anggapan pengetahuan mereka di bawah seksyen 37(d) ADB 1952. Seterusnya gagal untuk menimbulkan keraguan yang munasabah di atas imbangan kebarangkalian terhadap kes pendakwaan.

[24] Both the appellants were thus convicted and sentenced to death on the amended charges proffered against them respectively. Hence the appeal before us.

GROUNDS OF APPEAL

[25] Before us, learned counsel for the first appellant canvassed only one main ground of appeal, namely, that there were non compliance with s 20A and paras 13, 14 and 15 of the Fourth Schedule of the Criminal Procedure Code ('the CPC') in respect to the discovery of the impugned drugs from the first appellant. Learned counsel's complaint was that the capsules were recovered in the presence of the sentries but in the absence of a qualified medical officer. Learned counsel argued that an intrusive search was done without the first appellant's consent. Therefore, it was argued that the seizure of the capsules were done illegally. Learned counsel further submitted that the evidence of the sentries were not corroborated without the production of the medical records, the x-ray records and the station diary in court.

[26] The other issue raised by learned counsel for the first appellant was on the failure of the investigating officer ('PW11') to investigate Mehdi eventhough 'Alcontara Notice' had been given. Learned counsel also raised question as to why no investigation was done in respect of the appellant' handset which had been confiscated by the police.

[27] Learned counsel for the second appellant canvassed three gounds of appeal before us, namely:

(a) that the learned trial judge erred in rejecting the second appellant's defence;

(b) that the learned trial judge had failed to appreciate the second appellant's defence; and

(c) that the learned trial judge erred in accepting that the conduct of the second appellant in attempting to run away works against the second appellant.

OUR DECISION

[28] As regard to the issue on intrusive search raised by learned counsel for the first appellant, it was argued that the capsules were excreted in the presence of the sentries in the absence of a qualified medical officer. Learned counsel contended that the relevant provisions of the CPC had not been complied with, rendering the evidence given by the sentries to be inadmissible and the evidence not receivable. Learned counsel argued further that the evidence of the sentries ('PW4', 'PW5', 'PW6', 'PW7' and 'PW8') were not corroborated in material particulars in respect of the capsules excreted by the appellants.

[29] We disagreed with learned counsel submission on this issue. We reproduce the relevant provisions under s 20A and the Fourth Schedule of the

CPC for ease of reference:

> 20A Procedure on search of a person.
>
> (1) Any search of a person shall comply with the procedure on body search as specified in the Fourth Schedule of this Code.
>
> (2) Notwithstanding any written law, the provisions of the Fourth Schedule shall apply to any search of a person conducted by any officer of any enforcement agency conferred with the power of arrest or search of a person under any law.
>
> (3) The Minister charged with the responsibility for internal security and public order may amend the Fourth Schedule by order published in the Gazette.

[30] There are four types of body search listed at para 2 of the Fourth Schedule, and they were as follows:

(a) pat down search;

(b) strip search;

(c) intimate search; and

(d) intrusive search.

[31] Learned counsel argued that the appellants were subjected to intrusive search without compliance with the procedures as mandated under paras 13, 14 and 15 of the Fourth Schedule which provides as follows:

> 13 Intrusive search
>
> (1) An intrusive search means a search involving the examination of a person arrested to determine the existence of any object, evidence, weapon or contraband inside the body or body orifices of the person and includes the removal of such object, evidence, weapon or contraband.
>
> (2) The intrusive search shall only be conducted by a Government Medical Officer or a Medical Officer, or by any hospital assistant or a registered nurse acting under the Government Medical Officer or a Medical Officer's direction.
>
> 14 Authorization to conduct intrusive search
>
> (1) An intrusive search shall not be conducted, without the prior approval of an Officer in charge of the Police District or in the case of any other enforcement agency, by the officer whose authority is equivalent to the authority of an Officer in charge of the Police District.
>
> (2) The approval under subparagraph (1) shall be recorded in the station diary and in the case of other enforcement agencies, such approval shall be recorded in a proper book of record.

(3) A Government Medical Officer or a Medical Officer after being served with a copy of the request for an intrusive search containing particulars of the approval of the officer under subsection (1) shall, as soon as possible, conduct the intrusive search or direct any hospital assistant or a registered nurse to conduct the search.

15 Procedure on intrusive search

Whenever an intrusive search on a person arrested is conducted, the following procedure shall be complied with:

(a) the person arrested may be taken to the nearest hospital as soon as practicable for the search to be conducted accompanied by an officer;

(b) the accompanying officer, who is of the same sex as the person arrested, shall witness the search and shall take into custody of any weapon, object, evidence or contraband recovered pursuant to the search;

(c) a list of all things seized in the course of the search shall be prepared by the officer conducting the search and signed by the person arrested and he shall be given a copy thereof.

[32] Reading the provisions under para 13(1) above, we are of the view that intrusive search not only involved the act of examination to determine the existence of any object, evidence, weapon or contraband, but also includes the removal of such object, evidence, weapon or contraband. It is thus clear from the provisions that the word 'removal' strongly indicates an affirmative or positive action either by means of medical appliances or by means of forceful work by somebody upon the appellants. In this case, we did not find such things being done upon the appellants before they excreted the capsules. The evidence of the sentries showed that all the capsules were excreted through the bowel movement of the appellants without intrusive body search. We hold that normal bowel movement does not fall within the meaning of intrusive search (see also *Public Prosecutor v Bayati Heidar* [2016] 6 MLJ 1; [2017] 1 CLJ 669 (CA)).

[33] As regard to learned counsel's argument that the evidence of the sentries were not corroborated in material particulars due to the non-production of any medical records, x-ray records and the station diary, our answer is easily found in s 134 of the Evidence Act 1950, which provides as follows:

134 No particular number of witnesses shall in any case be required the proof of any fact.

[34] In *Tan Lay Hwa v Public Prosecutor* [2016] MLJU 1676; [2016] 1 LNS 507 this court had the occasioned to decide on the same issue where His Lordship Ahmadi Asnawi JCA had said this:

[66] It is true that the prosecution's case rested on the evidence of PW4, a police witness. However, the learned judge found him to be a credible witness and believed

him. As such his evidence was sufficient to establish the case for the prosecution on account that under the law, there is no requirement for his evidence to be corroborated. Any requirement for his evidence to be corroborated will infringe s 134 of the EA 1950, which provides that no particular number of witnesses shall in any case be required for proof of any fact.

[67] Additionally, the nature of the case herein does not fall within that category of cases where the nature of the testimony of the single witness itself requires that corroboration should be insisted upon as a rule of prudence — see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at p 310; [2005] 1 CLJ 85 at p 94. That would appropriately belong to the realm of sexual offences.

[35] In *Bakri Mohamad Ali v PP* [2010] 1 CLJ 610, Balia Yusoff Wahi J (now FCJ) on the similar vein opined:

[28] The evidence of SP4 indicates that on 28 August 2001 he was requested by SP3 to hear her telephone conversation with the appellant and he was also told by SP3 that the appellant did request for money and sexual favours before he could complete the report for extension of time of the company's contract. Taken in its entirety the evidence adduced by the prosecution through SP4, the tape recording and the BPR report should have been considered sufficient corroboration which the learned SCJ was looking for. He has failed to consider those evidence. Failure to consider or improper consideration of evidence by a trial judge affords ground for intervention by an appellate court. An appellate court is entitled to act upon its own view of the evidence where the trial judge has failed to take account of material circumstances (*Yusoff Kassim v Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ Rep 376). As I have stated earlier in this judgment as to the status of SP3 being a trap witness, it is not a mandatory requirement of the law that the evidence must be corroborated. Corroboration can come in different form, documentary or oral, direct or circumstantial. Courts can act on the testimony of a single witness if the said witness is credible and very much depends on the facts and circumstances of the case. Where the evidence of a witness does not require to be corroborated in law, there is no obligation to tender corroborative evidence to support his testimony. Section 134 of the Evidence Act provides that no particular number of witness shall in any case be required for the proof of any fact. The Latin maxim testes ponderantor non numerantor (witness are weighed, not numbered or counted) applies. (See: *Balachandran v PP* [2005] 1 CLJ 85). There is no reason only the evidence of SP3 could be accepted on its own.

[36] One final issue raised by learned counsel for the first appellant was on the failure on the part of the police, especially the investigating officer PW11 to investigate 'Mehdi'. Learned counsel argued that the failure to investigate 'Mehdi' had caused great injustice and prejudiced to the appellants' defence. Learned counsel as well argued that 'Alcontara Notice' had been effectively given to the police.

[37] The learned trial judge held that the appellants defence relying on 'Mehdi' was an afterthought simply because all the issues raised by the defence

regarding 'Mehdi' was only raised during defence stage eventhough the name 'Mehdi' was mentioned during the prosecution's case. Nevertheles, all the issues regarding 'Mehdi' and the part played by him was never put to the witnesses during the prosecution's case. Therefore relying on the decision in *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151, the learned trial judge held that the appellants' version about 'Mehdi' was an afterthought and recent invention (see at pp 40–41 AR Vol 1).

[38] After perusing the appeal record, we disagree with the learned trial judge's finding on this issue. The name 'Mehdi' not only came out during cross-examination of PW11 but had been mentioned in the cautioned statement recorded from the first appellant as admitted by PW11. The evidence of PW11 under cross-examination at pp 197–199 and 215 AR Vol 2C revealed this:

S: Setuju Rasoul kata, seorang bernama Mehdi menyuruh dia menelan kapsul-kapsul itu?

J: Tahu.

S: Rasoul kata dia tak tahu isu kandungan kapsul itu dalam pernyataannya?

J: Benar.

S: OKT kata Mehdi beritahu itu adalah bahan ubat tradisional untuk gigi?

J: Ya.

S: OKT Rasoul kata 2 hari sebelum bertolak dari Tehran, Iran, OKT1 dan OKT2 berjumpa Mehdi di Tehran dan Mehdi bawa mereka ke bandar bernama Urummiyyeh, kemudian dibawa ke Arbil, Iraq di mana mereka menginap di Hotel Fanouk di mana Mehdi tunjukkan ubat tradisional untuk gigi, tetapi ubat itu telah ditukar di bilik sebelah, dan dia terkejut bila sampai ke Malaysia didapati dadah?

J: Benar.

S: Rasoul kata dia tak tahu berkenaan dadah tersebut tetapi Mahdi yang menganiayakan Rasoul?

J: Tak setuju.

S: Katakan beliau ada memaklumkan kepada mana-mana anggota kepada officer daripada dia ditangkap sehingga pegawai perakam bahawa telah dimaklumkan oleh seseorang bernama Mehdi untuk membawa menelan kapsul yang dikatakan berisi ubat tradisional gigi tersebut ke Malaysia tetapi memandangkan tiada Jurubahasa pihak kamu tidak memahami apa yang dia katakan?

J: Tak setuju

S: Kamu mempunyai kepada percakapan beramaran beliau, setuju bahawa dalam percakapan beliau ada menyebut tentang Mehdi telah meminta OKT menelan kapsul tersebut. Ada seseorang bernama Mehdi?

J: Ya, setuju.

[39] We might agree with the learned counsel's complaint that the learned trial judge had misdirected himself on certain part of the appellant defence regarding 'Mehdi' and for the failure to adequately appreciate the defence case, but nevertheless we disagree with learned counsel's argument in putting the blame on the prosecution for its failure to investigate 'Mehdi' at all. Based on the evidence of PW11 (since the cautioned statement of both the appellants were not produced in court), we were of the view that the police cannot be blame for their failure to investigate 'Mehdi' in the absence of further particulars of 'Mehdi'. We opined that no effective 'Alcontara Notice' had been given to the police. PW11 in her cross-examination at p 199 AR Vol 1 stated:

S: Apakah siasatan yang dijalankan oleh kamu berkaitan maklumat oleh OKT?

J: Saya tidak dapat siasat atas maklumat ringkas, tiada nama penuh dan alamat serta butiran-butiran lain.

S: Setuju OKT1 tiada maklumat lanjut?

J: Ya.

[40] There are a plethora of decided cases on 'Alcontara Notice', one of which is the case recently decided by this court in *Chonmanee Laphathanawat v Public Prosecutor* [2017] 4 MLJ 227; [2017] 1 LNS 72, where Idrus Harun JCA, when citing with approval the decision of this court in *Marimuthu a/l Seringan lwn Pendakwa Raya* [2016] MLJU 1561; [2016] 1 LNS 64, said:

> [40] In *Marimuthu a/l Seringan lwn Pendakwa Raya* [2016] MLJU 1561; [2016] 1 LNS 64 in considering the issue of the Alcontara Notice the High Court said:
>
> > [32] Peguambela terpelajar berhujah bahawa 'Notis Alcontara' telah dikemukakan dengan awal. Dengan hormatnya kami tidak bersetuju. Kami tidak bersetuju bahawa satu 'Notis Alcontara' yang lengkap dan sempurna telah diberikan kepada pihak polis. Di dalam kes *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705; [1996] 1 LNS 597, fakta dalam kes itu berbeza dengan fakta dalam kes semasa terhadap perayu. Dalam kes itu, butir-butir penuh penama 'Che Mat' yang disebutkan oleh perayu dalam kes itu telah diberikan sepenuhnya di dalam Percakapan Beramaran yang telah dirakam dari perayu dalam kes itu, tetapi tidak di dalam kes semasa terhadap perayu.
> >
> > [33] Dalam kes *Rengarajan Thangavelu v PP* [2015] 1 CLJ 993, Mahkamah Rayuan telah membuat keputusan atas isu yang sama, seperti berikut:
> >
> > > [10] In respect of ground (i) we have meticulously looked into the cautioned statement. There was no sufficient information for the police to investigate the case in relation to the person 'Pandian' who the appellant says gave the drugs to him. And also there was no sufficient information of the person who the appellant says the drugs were supposed to be handed over to by him as per 'Pandian's', direction. From the decided cases, the information in the cautioned statement without sufficient information of 'Pandian' and the purported recipient is a story and is not a good 'Alcontara Notice' for placing an obligation on the part of the prosecution

to rebut the same. The story if true, places the burden on the appellant to rebut trafficking on the balance of probabilities. That is to say, he may have to call 'Pandian' or the purported recipient to give evidence in support of his case. However, if he has given a good 'Alcontara Notice' the obligation will be for the prosecution to track down 'Pandian' or the purported recipient to ascertain the truth of the appellant's story to the satisfaction of the court. A bad 'Alcontara Notice' does not help the appellant at all but imposes an obligation on the appellant to lead evidence in relation to his story to rebut trafficking, that too on a balance of probabilities. In *Phiri Mailesi (Zambian) v PP* [2013] 5 MLJ 780; [2013] 1 LNS 391, the Court of Appeal, through Hamid Sultan bin Abu Baker JCA on '*Alcontara* Notice' had this to say:

> It is pertinent to note that the 'Alcontara Notice' must have sufficient particulars in the right perspective and not a vague notice where the prosecution will not be able to advance their investigation to rebut the defence story or version. It must also be given at the earliest opportunity at the material time of the arrest or at least upon counsel taking instruction from the accused to conduct its defence in addition the defence's version should be put at prosecution stage and to positively evaluate the story of the accused relating to 'Alcontara Notice' before evaluating the prosecution case and applying the maximum evaluation as Alcontara case places the onus on the prosecution to rebut or sufficiently explain that they have discharged that onus. In the instant case evidence will show that the defence has not given an 'Alcontara Notice' in the right perspective.

[41] In the appeal before us the learned trial judge had made the following findings with regard to the characters of Bord, Wit and Wan:

> [48] Di sini, tiada apa-apa keterangan yang menunjukkan maklumat jelas mengenai Bord, Wit dan Wan diberikan kepada pegawai penyiasat atau pihak polis. Apa yang dinyatakan di dalam D126 adalan Bord merupakan seorang lelaki berkulit hitam yang tertuduh dikenali melalui internet dan Wit dan Wan adalah perempuan warganegara Thailand.

[42] Based on the evidence and case authorities referred to above, we were satisfied that the defence had failed to provide sufficient and good particulars in connection with the appellant's evidence on the three individuals and the places where she had stayed whilst in Brazil that would call for investigation by the police. In the event the defence argument on this aspect of its case collapsed.

[41] Similarly, in our case at hand, we hold that no effective 'Alcontara Notice' had been given by the appellants as regard to 'Mehdi'. Therefore, the police cannot be blame for the failure to investigate 'Mehdi'.

[42] We now turn to consider the three grounds of appeal canvassed before us by the learned counsel for the second appellant. As regard to the first ground of appeal that the learned trial judge erred in rejecting the second appellant's defence for being an afterthought and recent invention, we agreed with learned

A counsel's complaint that the learned trial judge had erred on this point. As we had said earlier in our judgment, the second appellant's defence regarding 'Mehdi' was not an afterthought or a recent invention. The name 'Mehdi' had been mentioned in the cautioned statement of the appellant albeit they were not produced in court. We have also decided that there was no effective
B 'Alcontara Notice' given by the appellants as the particulars of 'Mehdi' was never furnished to the police for further investigation. Therefore, the police cannot be blame for the failure on their part to investigate 'Mehdi'.

C **[43]** In respect of the second complaint that the learned trial judge had failed to adequately appreciate the second appellant's defence, we disagree. The defence put up by the appellants was that they claimed that they were an innocent carrier. This main defence of the appellants had been considered by the learned trial judge. We found that the learned trial judge had considered all
D the issues raised during their defence as seen in his grounds of judgment at pp 33–43 AR Vol 1. After considering all the evidence and after having heard the parties, the learned trial judge had rejected the appellants' defence of innocent carriers. We did not find the finding of the learned trial judge perversed warrant an appellate intervention. The evidence against both the
E appellants were overwhelming.

[44] We agreed with the learned trial judge that the appellants' evidence that they had swallowed the capsules to avoid paying tax as unbelievably incredible. One thing for sure is that bringing in dental medicine as they claimed into
F Malaysia was not prohibited and it was also not dutiable goods. At pp 42–43 AR Vol 1, the learned trial judge had considered this:

> (g) Memandangkan bahawa watak 'Mehdi' ini hanya rekaan OKT-OKT maka pembelaan 'innocent carrier' atau 'momentary carrier with no knowledge of drug
G contents' adalah gagal sama sekali. Rujuk kes *Teh Hock Leong vs PP* [2010] 1 MLJ 741.
>
> (h) Pembelaan kedua-dua OKT juga adalah bahawa mereka menelan kapsul-kapsul tersebut bertujuan untuk mengelak cukai yang tinggi ke atas bahan tersebut juga adalah tidak munasabah dan 'afterthought defence', keputusan ini telah
H dirakamkan oleh Mahkamah Rayuan di dalam kes *Modjtaba Hosseinzadeh Majid & Hamid Hosseinzadeh Abdolhossein v PP* [2015] 1 LNS 434 telah menolak pembelaan tersebut atas alasan pembelaan tersebut bersifat 'after thought'. Mahkamah Rayuan telah merujuk kepada kes *Tunde Apatira vs Public Prosecutor* [2000] 1 CLJ 381.
>
> I (i) Berdasarkan kepada alasan-alasan di atas saya berpuashati bahawa pembelaan OKT-OKT ini tidak boleh dipercayai dan telah gagal untuk mematahkan anggapan pengetahuan mereka di bawah seksyen 37(d) ADB, 1952. Seterusnya gagal untuk menimbulkan keraguan yang munasabah di atas imbangan kebarangkalian terhadap kes pendakwaan.

[45] On the issue of innocent carrier, we refer to the latest Federal Court decision in *PP v Herlina Purnama Sari* [2016] MLJU 1824; [2017] 1 MLRA 499, where Raus Sharif PCA (now CJ Malaysia) had said this which we quoted in extenso:

> [43] In our assessment, looking at the evidence in totality, the Respondent could not exculpate herself from her involvement in the trafficking of the seized drugs by saying that she had no knowledge or that she was an 'innocent carrier' in this transaction. In our view, she could not be 'innocent' when she voluntarily agreed to hand over the boxes to a third party that she hardly knew in another country without enquiring further as to the contents of the said boxes. The Respondent, without any such inquiry, which she would have been reasonably expected to make in any event, had agreed to give the boxes to someone just as a favour for her friend Vivian. The Respondent should have refused to carry out such an assignment if no satisfactory explanation as to their contents was forthcoming from Vivian whom she was in contact with. Her failure to do so makes her guilty of willful blindness.
>
> [44] Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and couplet with) a deliberate decision not to make further investigations. Whether the doctrine of willful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case giving due weight, where necessary, to the credibility of the witnesses (see *PP v Tan Kok An* [1995] 4 MLRH 256).
>
> [45] The concept of 'wilful blindness' had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424. The doctrine of 'willful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness'. In other words he is then taken to know the true situation. He then cannot be said to have their rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.
>
> [46] Most of the cases where the concept was held to apply concerned cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to dispel or to set straight such suspicions. Should the accused not make any or any sufficient inquiries under those circumstances, the concept of willful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those

A contents. In other words, if he deliberately 'shuts his eyes' to the obvious, because he doesn't want to know' he is taken to know.

[46] We now turn to consider the third and final ground of appeal canvassed before us by learned counsel for the second appellant on the issue of overt act of the appellants in attempting to run away from PW1 and his team. Learned counsel's complaint was that the oral evidence of PW1 saying that the appellants had attempted to run away was not supported by PW1's police report (P84 at pp 127–128 AR Vol 3 and D104 at pp 137–138 AR Vol 3).

[47] The evidence of PW1 during cross-examination and during re-examination revealed that the appellants had attempted to run away. PW1 in cross-examination (at p 237 AR Vol 2C) stated:

S: OKT1 tidak buat apa-apa overt act (seperti jerit, merayu dan lain-lain)?

J: Dia ada cuba lari

Rujuk P84 dan D104

S: Perkara ini tidak dimasukkan dalam kedua-dua report?

J: Ya.

And at p 241 AR Vol 2C, under re-examination, PW1 said:

S: Kamu ada mengatakan bahawa kedua-dua OKT ini ada cuba melarikan diri, boleh jelaskan bila perkara ini berlaku?

J: Semasa saya dan anggota hendak tahan mereka di Pintu 3 dan 4 KLIA.

S: Apa maksud kamu cuba melarikan diri?

J: Apabila saya dan team saya mendekati dan hendak tangkap, dia bergerak untuk melarikan diri.

S: Masa itu sudah perkenalkan polis atau belum?

J: Kita sudah perkenalkan diri dan menjerit polis.

[48] When asked as to why this fact was not stated in his police report, PW1 explained at p 241 AR Vol 2C, as follows:

S: Tetapi kenapa perkara ini tidak dinyatakan dalam laporan polis D104?

J: Kerana ia boleh dinyatakan dalam statement saya.

S: Tapi perkara ini memang benar-benar berlaku?

J: Ya.

[49] The learned trial judge had taken into consideration the fact that both the appellants had attempted to run away as one of the factors to fastened the element of knowledge against the appellants. At p 30 AR Vol 1, His Lordship

stated in his grounds of judgment as follows:

> 28. Mengenai percubaan melarikan diri dan pergelutan oleh kedua-dua OKT, saya berpuashati dengan penjelasan oleh SP1, seterusnya saya berpendapat keterangan SP1 tersebut boleh diterima, saya percaya SP1 tidak mungkin akan berbohong semata-mata agar OKT1 dan OKT2 boleh disabitkan, SP1 tiada apa-apa kepentingan sama ada OKT1 dan OKT1 ini disabitkan atau tidak.

[50] We found no error on the part of the learned trial judge in accepting the explanation proffered by SP1 as regard to why his police report did not state the material fact that the appellant had made an attempt to run away. After all, the failure to state that fact does not in any way prejudiced the appellants materially. We echoed the sentiment of several authorities decided by every level of our courts that police report being first information report should not include every minute detail of the incident regarding the arrest and seizure of the exhibits. It is sufficient to contain some information to trigger an investigation.

[51] On this similar issue regarding first information report ('FIR'), we agreed with the view given by Abdul Aziz Mohamad FCJ in *Lee Ah Seng and Anor v Pendakwa Raya* [2007] MLJU 346; [2007] 5 CLJ 1 as follows:

> [20] The consequences of an omission to state an important matter in the FIR have been mentioned in several Indian authorities, of which the following may be cited. In *Sher Ali v Emperor* (29) AIR 1942 Pesh 51, at p 52 C2, the story of an incident related by a witness was held to be rightly disbelieved by the trial court because the witness did not mention the incident in the FIR that he had made. In *Ramlal Singh v State AIR* (45) 1958 MP 380, paras (12), (13), HR Krishnan J disagreed with the sessions judge in being very greatly impressed by a boy witness's account of the happening because it was not mentioned in the FIR of the person to whom the boy must have related what he saw if he had seen it. He said that the FIR 'is a piece of corroborative evidence; omissions in it will, other things being the same, deprive prosecution of the most valuable corroboration and thereby make the story suspicious'. In *Hari Nath v State of UP AIR* 1988 SC 345, one at least of several eye-witnesses to a dacoity could reasonably be expected to have known some of the appellants, but the identity of the culprits was not disclosed in the FIR. At para 7, Venkatachaliah J said: 'The omission to disclose their identity in the FIR would raise a reasonable doubt about their complicity in the crime'.
>
> [21] The Court of Appeal said (judgment, para 13) that 'it would not be in accordance with the settled principle if the evidence of PW7 in court should be considered unreliable by reason of him failing to include the name of the appellants his report an important information, that is to say, of omissions in the FIR'. The Court of Appeal recognized, as may be seen from the next paragraph of their judgment (para 14), that the consequences of omissions in the FIR were considered in *Herchun Singh & Ors v PP* [1969] 2 MLJ 209; [1969] 1 LNS 52, and they cited a passage in which the then Federal Court cited with approval a passage from *Sohoni's Commentary* on s 154 of the Indian Criminal Procedure Code (16th Ed) Vol 1 at p 750), part of which reads as follows:

A ... But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not ipso facto lead to the case being thrown out. But it is piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.

B

When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission ... .

C

[52] We hold the view that the failure on the part of PW1 to state in his FIR the material fact that the appellants had attempted to run away is in no way fatal to the prosecution's case. What matters most is the question whether the conviction of the learned trial judge is safe or not. We found the answer to be

D in the affirmative by looking at the overwhelming evidence adduced by the prosecution against both the appellants.

CONCLUSION

E **[53]** Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it was our finding that the trafficking charges as amended had been proven against the appellants beyond a reasonable doubt.

F **[54]** We found no merits in the appellants' appeals. Their convictions are safe. The findings of the learned trial judge are not perversed. We dismissed the appellants' appeals and we affirmed the convictions and sentences of the High Court.

G *Appeals dismissed and convictions and sentences affirmed.*

Reported by Ashok Kumar

H

I